

STATE OF MICHIGAN  
COURT OF APPEALS

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MARY C. KALLMAN and HIGGINS LAKE  
PROPERTY OWNERS ASSOCIATION,

UNPUBLISHED  
February 1, 2007

Plaintiffs-Appellees,

v

SUNSEEKERS PROPERTY ASSOCIATION,  
LLC,

No. 263633  
Roscommon Circuit Court  
LC No. 03-724042-CH

Defendant-Appellant.

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Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right a bench trial judgment granting plaintiffs injunctive relief on their nuisance in fact and nuisance per se claims. We reverse. This dispute arises out of defendant's maintenance and use of a dock on Higgins Lake.

Defendant first argues that plaintiffs failed to present evidence that they were harmed by its conduct and therefore the court's conclusion that a nuisance in fact existed was erroneous. We agree. We review a trial court's findings of fact in a bench trial for clear error. MCR 2.613(C). Its conclusions of law are reviewed de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Its application of facts to the law is also reviewed de novo. *Cain v Dep't of Corrections*, 451 Mich 470, 503 n 38; 548 NW2d 210 (1996).

Riparian land is "a parcel of land which includes therein a part of or is bounded by a natural water course."<sup>1</sup> *Thompson v Enz*, 379 Mich 667, 677; 154 NW2d 473 (1967). "[R]iparian rights" are special rights to make use of water in a waterway adjoining [a riparian] owner's property." *Dyball v Lennox*, 260 Mich App 698, 705; 680 NW2d 522 (2003) (citation omitted). It is well-established "that riparian rights are property." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 191; 521 NW2d 499 (1994) (citation omitted). Riparian rights include the right to erect a dock. *Tennant v Recreation Dev Corp*, 72 Mich App 183, 186; 249 NW2d

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<sup>1</sup> "Strictly speaking, land which includes or abuts a river is defined as riparian, while land which includes or abuts a lake is defined as littoral." *Thies v Howland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985). We nevertheless consider this dispute as invoking "riparian" rights because "riparian" is often used to describe both types of land." *Id.*

348 (1976), citing *Hilt v Weber*, 252 Mich 198, 225; 233 NW 159 (1930). However, the right of use by a riparian proprietor is “not absolute. It is a natural right, qualified and limited by the existence of a like right on the part of others.” *Monroe Carp Pond Co v River Raisin Paper Co*, 240 Mich 279, 285; 215 NW 325 (1927). “Reasonable use” is the standard by which the propriety of riparian owners’ uses are judged. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 512; 534 NW2d 212 (1995). While reasonableness determinations are a question of fact, *id.* at 513, such determinations are informed by considering “the size, character and natural state of the water course; . . . the type and purpose of the uses proposed and their effect on the water course; and . . . [the balance between] the benefit that would inure to the proposed user [and] the injury to the other riparian owners,” *id.* (citation omitted).

Nuisance is an interference with a landowner’s use and enjoyment of her land. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 59; 602 NW2d 215 (1999). “A private nuisance is a nontrespassory invasion of another’s interest in the private use and enjoyment of land.” *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). Nuisances may be either *per se* or *per accidens*, that is, at law or in fact. *McDowell v Detroit*, 264 Mich App 337, 348-349; 690 NW2d 513 (2004). A nuisance in fact is a nuisance “‘by reason of circumstances and surroundings.’” *Id.* at 349. “To establish the existence of a nuisance in fact, . . . a plaintiff must show ‘significant harm resulting from the defendant’s unreasonable interference with the use or enjoyment of the property.’” *Id.* (citation omitted and emphasis in original); see, also, *Adkins*, *supra* at 304. A riparian owner’s exercise of riparian rights may give rise to an actionable claim of nuisance by another riparian owner whose exercise of riparian rights is injured by the same. See *Attorney General ex rel Wyoming Twp v Grand Rapids*, 175 Mich 503, 533-535; 141 NW 890 (1913).

The trial court concluded that defendant’s dock use was unreasonable, given the circumstances, and this constituted a nuisance in fact. While we find the court’s factual findings to be supported by the record, we further conclude the court erred in the application of these facts to pertinent law. See *Cain*, *supra* at 503 n 38. Defendant’s use was not in conformity with the surrounding uses, given the character of Higgins Lake. See *Lakeland Investments*, *supra* at 513. Nevertheless, the court made no finding that plaintiffs were significantly harmed by defendant’s actions, see *Adkins*, *supra* at 304; *McDowell*, *supra* at 349, and the record is wholly devoid of any evidence to support such a finding. Plaintiffs presented no proofs demonstrating any specific harm as a consequence of defendant’s conduct,<sup>2</sup> let alone the *significant harm* required

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<sup>2</sup> For this reason, we are dubious about the court’s conclusion that defendant’s dock maintenance and use was unreasonable. A determination that a riparian landowner’s exercise of his riparian rights is unreasonable involves a balancing of “the benefit that would inure to the proposed user [and] the injury to the other riparian owners.” *Lakeland Investments*, *supra* at 513 (citation omitted). The court’s conclusion that defendant’s use was unreasonable therefore necessarily involved a determination that plaintiffs suffered an injury outweighing any benefits inuring to defendant. Because plaintiffs presented no evidence of any specific injury, the factual support for the court’s reasonableness analysis was necessarily lacking. But because a showing of “significant harm” otherwise requires affirmative proofs, see *Adkins*, *supra* at 317-319; *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 490-491; 608 NW2d 531 (2000), we find it unnecessary to evaluate the court’s unreasonableness determination.

to sustain their nuisance claim, *Adkins, supra* at 304; *McDowell, supra* at 349. Because plaintiffs did not present evidence demonstrating significant harm, the court improperly concluded they established nuisance in fact.

Defendant next argues that the court erred in concluding that plaintiffs established a nuisance per se under MCL 125.294.<sup>3</sup> We agree, but for different reasons. Our review of this issue necessarily leads us to conclude that plaintiffs lack standing under MCL 125.294.

MCL 125.294 provides as follows:

A use of land, or a dwelling, building, or structure including a tent or trailer coach, used, erected, altered, razed, or converted in violation of a local ordinance or regulation adopted pursuant to this act is a nuisance per se. The court shall order the nuisance abated and the owner or agent in charge of the dwelling, building, structure, tent, trailer coach, or land is liable for maintaining a nuisance per se. The township board shall in the ordinance enacted under this act designate the property official or officials who shall administer and enforce that ordinance and do either of the following for each violation of the ordinance:

(a) Impose a penalty for the violation.

(b) Designate the violation as a municipal civil infraction and impose a civil fine for the violation.

“A public nuisance is an unreasonable interference with a common right enjoyed by the general public.” *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). “At common law, acts in violation of law constitute a public nuisance.” *Attorney General ex rel Optometry Bd of Examiners v Peterson*, 381 Mich 445, 465; 164 NW2d 43 (1969). “A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public.” *Cloverleaf Car Co, supra* at 190.

In *Towne v Harr*, 185 Mich App 230; 460 NW2d 596 (1990), this Court interpreted and applied MCL 125.294 in the context of a nuisance action. We recognized that a land use violating a local ordinance constitutes a nuisance per se under the statute. *Towne, supra* at 231. We observed, however, that the

statute further provides that the township board enacting the ordinances *shall* administer and enforce the same and that the court *shall* order such nuisance abated. Thus, pursuant to the statute, any violation of a local township zoning ordinance constitutes a nuisance per se and is to be ordered abated by the court upon an action being brought by the officials designated to administer and enforce the ordinance. [*Id.* at 231-232 (emphases in original).]

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<sup>3</sup> We note that MCL 125.294 was repealed by 2006 PA 110, though it remained in effect during the relevant circumstances of this dispute.

We then concluded that the plaintiffs lacked standing, reasoning as follows:

Given the purpose for which zoning ordinances are enacted and enforced, we believe a nuisance arising from the violation of the same must by its very nature constitute a “public” nuisance. Generally, a public nuisance gives no right of action to an individual and must be abated by the appropriate public officer. However, our Supreme Court has long recognized the propriety of private citizens bringing actions to abate public nuisances, arising from the violation of zoning ordinances or otherwise, when the individuals can show damages of a special character distinct and different from the injury suffered by the public generally. Enactment of MCL 125.294, rendering buildings erected in violation of local zoning ordinances nuisances per se, does not vitiate a private individual's longstanding right to bring an action to abate a public nuisance. Instead, the statute's designation of all buildings erected in violation of local ordinances as nuisances per se reduces the quantity of proofs required of an individual to prove a public nuisance, as the existence of the nuisance may be established merely by showing a violation of the ordinance. Thus, individuals need not prove a nuisance in fact, as the zoning violation renders the building a nuisance per se. However, . . . [existing case law does not] relieve[] an individual bringing suit to abate a public nuisance from the burden of proving special damages. Any such attempt by this Court to do so would necessarily fail, as an individual's proof of special damages has been a longstanding requirement under Michigan's common law, dating back at least as far as 1872.

In the instant case the trial court's findings indicate plaintiffs failed to prove special damages resulting from the . . . violation of the zoning ordinance. Plaintiffs therefore had no standing to bring the instant suit to abate the nuisance, and the trial court's order granting plaintiffs said relief must be vacated. [*Id.* at 232-233 (citations omitted).]

See, also, *Travis v Preston (On Rehearing)*, 249 Mich App 338, 346, 350-352; 643 NW2d 235 (2002) (citing *Towne* for standing requirement in the context of a nuisance action predicated on a violation of a zoning ordinance).

By virtue of the foregoing, we conclude plaintiffs lack standing to seek relief under MCL 125.294. Plaintiffs alleged defendant's actions violated the Lyon Township Zoning Ordinance. This alleged violation of the ordinance is a nuisance per se under MCL 125.294. However, it is also a public nuisance under *Towne* and *Peterson*. *Peterson, supra* at 465; *Towne, supra* at 232-233. To succeed in such an action, plaintiffs were required to demonstrate that they “suffered a type of harm different from that of the general public.” *Cloverleaf Car Co, supra* at 190. As we previously discussed, however, plaintiffs presented no evidence that they suffered any specific injury. Accordingly, we conclude plaintiffs lacked standing to enjoin defendant's alleged ordinance violation as a nuisance per se. See *Preston, supra* at 346; *Towne, supra* at 233. Therefore, the trial court erred in granting plaintiffs relief under MCL 125.294.

Finally, defendant argues that the court erred in concluding plaintiffs established a nuisance per se under MCL 324.30102. We agree. MCL 324.30102(c) prohibits the erection,

operation or maintenance of a marina without a permit from the Michigan Department of Environmental Quality (MDEQ). MCL 324.30101(i) defines “marina” as “a facility that is owned or operated by a person, extends into or over an inland lake or stream, and offers service to the public or members of the marina for docking, loading, or other servicing of recreational watercraft.” The trial court concluded that defendant was operating a marina under these provisions without a permit, and this constituted a nuisance per se that should be abated.

A nuisance per se “is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.” *McDowell, supra* at 348 (citation omitted). In *Garfield Twp v Young*, 348 Mich 337; 82 NW2d 876 (1957), our Supreme Court addressed whether a violation of law, in and of itself, constituted a nuisance per se requiring abatement. In *Young*, the defendant operated a junk yard, an activity not a “nuisance per se at common law.” *Id.* at 340. The plaintiff argued that the junk yard was a nuisance per se because it was being operated in violation of a licensing ordinance. *Id.* The Court rejected this argument, *id.* at 342, relying on the following reasoning from *Village of St Johns v McFarlan*, 33 Mich 72, 74 (1875):

“A court in chancery has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done, if carried out, would be a nuisance. If it were otherwise, the court might be called upon in all classes of cases to restrain the doing of acts prohibited by statute.

“The erection of a wooden building within the limits of a city or village is not in and of itself a nuisance. Neither does the fact that the erection of such is prohibited by ordinance make it a nuisance. If this were so, then the doing of any act prohibited by law would, upon the same reasoning, be a nuisance. The act, if prohibited, would be illegal; but something more than mere illegality is required to give this court jurisdiction. It was, however, insisted that the erection of a wooden building in a thickly settled portion of a village increases the danger in case of fire, and thereby injures adjoining property. There are, however, many kinds of trades and occupations, some of them prohibited by law, which, when carried on, equally tend to injure adjoining property, yet no one would contend that a court of chancery should interfere by injunction.”

See, also, *Adkins, supra* at 314 (relying on *Young* for the proposition that “the fact that violations of law may have occurred on the [defendant’s] property does not make the conduct of the business a nuisance in fact”).

By virtue of *Young* and *Adkins*, we conclude the trial court erred in finding that defendant’s violation of MCL 324.30102(c) constituted a nuisance per se requiring abatement. As in *Young, supra*, defendant’s maintenance and use of a dock is not a nuisance per se at common law. It is not an act “which is a nuisance at all times and under any circumstances, regardless of location or surroundings.” *McDowell, supra* at 348 (citation omitted). Indeed, use of a dock is expressly recognized as a riparian right at common law. *Tennant, supra* at 186. While it is otherwise clear that the maintenance of a dock without a permit from the MDEQ violates MCL 324.30102(c), *Young* and *Atkins* clearly indicate this does not, in and of itself, constitute a nuisance per se. *Adkins, supra* at 314; *Young, supra* at 342. Because its reasoning

allows no other conclusion, the trial court necessarily relied on defendant's violation of MCL 324.30102(c) to judge its action a nuisance per se. We conclude this was erroneous.

We vacate the court's order and remand this case to the trial court for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ Mark J. Cavanagh  
/s/ Bill Schuette